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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 727

WILLIAM P. SAILER AND STANLEY A. MILLER,

Appellants,

v.

ELSIE MARY JANE LEGER AND BERYL JERVIS,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

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BRIEF OF ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

STATEMENT OF INTEREST

This brief is filed with the consent of both parties herein.

The Association of Immigration and Nationality Lawyers is a national organization chartered under the laws of the State of New York. Its members are attorneys specializing in immigration, naturalization and nationality matters. Our interest in supporting the views of the majority opinion below prompts us to file this brief.

QUESTION PRESENTED

Whether the classification of the general assistance statute of the Commonwealth of Pennsylvania [62 P.S. 432(2)] which provides for welfare aid to United States citizens and to aliens filing declarations of intention during the period between January 1, 1938, and December 31, 1939, but denies similar aid to all other legally resident aliens in the state, is contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. 1981 (16 Stat. 144), provides:

> "Equal rights under the law.
>
> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (R.S. § 1977.)"

The Pennsylvania Public Welfare Code [62 P.S. 432(2)] provides:

> "Eligibility.
>
> "Except as hereinafter otherwise provided, and subject to the rules, regulations, and standards estab-

lished by the department, both as to eligibility for assistance and as to its nature and extent, needy persons of the classes defined in clauses (1) and (2) of this section, shall be eligible for assistance:

"(1) Persons for whose assistance Federal financial participation is available to the Commonwealth * * *.

"(2) Other persons who are citizens of the United States, or who, during the period January 1, 1938, to December 31, 1939, filed their declaration of intention to become citizens."

STATEMENT

Appellees, Elsie Mary Jane Leger and Beryl Jervis, citizens of Scotland and Panama, respectively, are lawful permanent residents of the United States and of the Commonwealth of Pennsylvania. Mrs. Leger is married to a disabled citizen of the United States and was gainfully employed for four years after her arrival here in May of 1965. During this period she was a tax paying resident of the State. When she became ill, disabled and unemployed in 1969 her application for financial assistance under the Pennsylvania Public Welfare Code was denied upon the basis of her alienage. Mrs. Beryl Jervis' employment and tax paying status in Pennsylvania continued for two years after her immigration to the United States in March, 1968. Temporary illness in February, 1970, forced her to apply for assistance which was likewise denied in view of her lack of United States citizenship.

Appellees sought declaratory judgment and injunctive relief against appellants, Executive Director of the Philadelphia County Board of Public Assistance and the Secretary of the Department of Public Welfare of Pennsylvania. A three judge District Court was convened pursuant to 28 U.S.C. 2281, 2284 and a majority of the Court on July 13, 1970, approved an order enjoining the enforcement of "that portion of the Pennsylvania Statute which denies general

assistance to persons because of alienage." A direct appeal to this Court followed.

I

THE EQUAL PROTECTION CLAUSE PROHIBITS INVIDIOUS DISCRIMINATION AGAINST ALIENS

The Fourteenth Amendment guarantees equal protection to all persons within the jurisdiction of a state. 42 U.S.C. 1981, implementing the Amendment, insures all persons in every state "the full and equal benefit of all laws * * * for the security of persons and property". These provisions:

> "embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws." *Takahashi v. Fish and Game Commission,* 334 U.S. 410, 420 (1948).

They pledge to aliens the protection of equal laws. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

Discriminations against aliens have been declared invidious and in violation of equal protection where a state restricted their right to operate a business, *Yick Wo v. Hopkins, supra,* their right to work, *Truax v. Raich,* 239 U.S. 33 (1915), or where commercial fishing licenses were denied, *Takahashi v. Fish and Game Commission, supra.*

However, a Cincinnati ordinance precluding aliens from conducting poolrooms where undesirables congregate has been upheld, *Clarke v. Deckebach,* 274 U.S. 392 (1927), and the denial of alien participation in public works projects has likewise been immune to attack, *Heim v. McCall,* 239 U.S. 175 (1915); but, see *Purdy and Fitzpatrick v. California,* 79 Cal. Rptr. 77, 456 P.2d 654 (1969). Denial to aliens of the right to hunt and possess firearms for such purpose has also been upheld. *Patsone v. Pennsylvania,* 232 U.S. 138 (1914). The common law denial of the right of aliens to hold land, originally sanctioned by this Court,

Webb v. O.Brien, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Cockrill v. California*, 268 U.S. 258 (1924), has been called into question by *Oyama v. California*, 332 U.S. 633 (1948).

These early cases denying aliens participation in public works projects, in natural resources and the right to own land have been the subject of sharp criticism. See *Konvitz, The Alien and the Asiatic in American Law* (1946), Chapt. 5, The Right of Aliens to Own Land; Chapt. 6, The Right of Aliens to Work; Chapt. 7, The Right of Aliens to Share in Natural Resources.

Today, no alien is any longer racially ineligible for citizenship (8 U.S.C. 1422). The basis for discrimination against ineligible aliens in the California land laws no longer obtains. It is now considered odious and contrary to our national welfare to discriminate on the basis of race or national origin against persons in public accommodations or in federally financed assistance programs, 42 U.S.C. 2000 (a)(1); 2000(d). Segregation in the utilization of our public educational facilities upon the basis of race or national origin violates equal protection. *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955); *McLauren v. Oklahoma*, 339 U.S. 637 (1950); *Gonzales v. Sheehy*, 96 F. Supp. 1004 (D. Ariz., 1951). Since 1945 we have subscribed to the United Nations Charter, 59 Stat. 1046, and in 1948 we sponsored the Universal Declaration of Human Rights which sought to ensure equal protection in employment and ownership of property regardless of national origin. (Articles 2, 7, 17, 23, Universal Declaration of Human Rights.)

Changing concepts of the dignity of man and the equality of persons to the enjoyment of life should now brand as invidious discriminations against resident aliens previously sanctioned by this Court in the cases noted above.

II

THE PENNSYLVANIA PUBLIC ASSISTANCE STATUTE CREATES AN INVIDIOUS DISCRIMINATION

(A)

History of Social Security and Public Assistance Laws

The Federal Social Security Act of 1935 (42 U.S.C. 301, et seq., 49 Stat. 620) was part of a broad legislative program to counteract the depression of 1929. The hope behind the statute was to save men and women from the rigors of the poorhouse and the fear of such a fate. *Helvering v. Davis*, 301 U.S. 619 (1937). The Act recognized unemployment as a national problem and sought to solve it by the cooperative legislative efforts of state and national governments. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937).

Programs of retirement insurance, survivors insurance, disability insurance, hospital and medical insurance, unemployment insurance, public assistance, services for maternal and child welfare, workmen's compensation, railroad retirement, veterans benefits and government employees retirement were adopted. The objectives of these federal-state programs were, *inter alia* "to keep individuals and families from destitution; to help them attain economic and personal independence; to keep families together; to give children the opportunity of growing up in health and security". *Social Security Handbook* (4th Ed. G.P.O.), p. 425.

Title XIV of the Social Security Act, 42 U.S.C. 1351 (64 Stat. 555), requires Federal payments to the states where plans were submitted and approved for aid to the permanently and totally disabled. *Arizona v. Hobby*, 221 F.2d 498 (D.C. Cir., 1954). In 1939 Pennsylvania enacted the statute here under attack and it receives Federal funds under its enactment. The one year residence provision of this statute was invalidated by this Court in *Shapiro v.*

Thompson, 394 U.S. 618, 625, 626, 657 (1969). Here, however, appellees seek funds under a program which is financed solely by the state.

Under Social Security programs financed by the Federal Government, a small minority of the states limit benefits to citizens of the United States. *Social Security Handbook, supra*, pp. 431, 432. See Appendix A.

(B)

History of Alien Discrimination in Pennsylvania

The Commonwealth of Pennsylvania is in the forefront of those states which restrict aliens in the right to work in public and private employment. See: *Konvitz, supra*, pp. 208, 190-207. The following limitations are prescribed by the state with reference to private occupations:

Accountants (citizen or intention to become one)	63 P.S. Sec. 9.3a
Architects (with exception for certain aliens)	63 P.S. Sec. 22(a)
Attorneys	Rule 13, Pa. Sup. Ct. Rules
Auctioneer	63 P.S. Sec. 706
Barber (citizen or intention to become one)	63 P.S. Sec. 553
Beneficial Ass'n. incorporators	15 P.S. Sec. 2851-201
Building & Loan Ass'n. directors	15 P.S. Sec. 1074-402
Engineer	63 P.S. Sec. 151(b)
Funeral Director	63 P.S. Sec. 479.3
Liquor & brewed beverage sales, distribution, etc.	47 P.S. Secs. 4-403(b) 4-409(c), 4-410(d), 4-431(c), 4-432(b), 5-503

Nurse, license, citizenship or declaration of intention to become citizen	63 P.S. Secs. 216, 224(9)
Pharmacists	63 P.S. Sec. 390-3
Physicians and surgeons (citizens or intention to become one)	63 P.S. Sec. 405
Poultry Technician	63 P.S. Sec. 642
Public works employment, with exceptions	43 P.S. Sec. 151
Real Estate Salesman	63 P.S. Sec. 437(c)
Veterinarian	63 P.S. Sec. 506-3

Pennsylvania sought unsuccessfully in 1939 to require state registration and identification cards for aliens, *Hines v. Davidowitz*, 312 U.S. 52 (1941). It limits the right of aliens to hunt, 34 P.S. 1311.1002, 1311.303(a) (1969 Supp.); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). At one time the right of aliens to fish was likewise restricted. Act of May 2, 1925, 30 P.S. 240, 241, repealed by Act of December 15, 1959, 30 P.S. 221 (1969 Supp.).

(C)

The Invidious Discrimination Created by the Pennsylvania Statute

The Pennsylvania Public Assistance Act denies relief to all aliens except those filing declarations of intention between January 1, 1938, and December 31, 1939.

In 1938 and 1939 Western Hemisphere Indians, Eskimos, Japanese, Koreans, Chinese, Filipinos and East Indians were ineligible for citizenship and unable to file declarations of intentions. *Gordon, Racial Barrier to American Citizenship*, 93 U. of Pa. Law Review, 237 (1945); *Wasserman, The Immigration and Nationality Act of 1952 - Our New Alien and Sedition Law*, XXVII, *Temple Law Quarterly 64* (1953). These classes were, therefore, denied the right to become eligible for assistance during the two year phase-out period

of all aliens from the program. Prior to 1941, declarations of intention were filed under the Naturalization Act of 1906 and were required to be filed not less than two years nor more than seven before petitioning for naturalization, 34 Stat. 597; 8 U.S.C. 379. Similar provisions were contained in the Nationality Act of 1940, 54 Stat. 1153; 8 U.S.C. 731. Under the 1952 Immigration and Nationality Act, declarations of intention are permitted but no longer required, 8 U.S.C. 1445, and all existing racial barriers to citizenship were removed. 8 U.S.C. 1422.

Pennsylvania is one of a very limited number of states restricting public assistance to citizens. This restriction cannot be sustained on the theory that public funds are saved thereby. *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969); *Goldberg v. Kelly*, 397 U.S. 262 (1970).[1]

As this Court stated in *King v. Smith*, 392 U.S. 309, 334 (1968), all responsible governmental agencies in the nation today recognize the enormity and pervasiveness of social ills caused by poverty. The Universal Declaration of Human Rights states:

> "*Article 25(1)*
>
> "Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Excluding legally resident aliens from state public assistance merely because of alienage is contrary to the precepts we advocate before the United Nations and constitutes a statutory discrimination which is not reasonably related to

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[1] The citizenship bar herein results in the annual denial of approximately 65-70 applications for public assistance. In the period 1960-1969, 84,982 aliens destined to Pennsylvania were admitted for permanent residence. During this period, 40,213 aliens were naturalized in the state. *Annual Report, Immigration and Naturalization Service* (1969), pp. 57, 113.

the purposes of the Act. Such discrimination violates equal protection. *Morey v. Doud*, 354 U.S. 457, 465 (1957). In *Williams v. Rhodes*, 393 U.S. 23, 30 (1968), it was stated:

> "The Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those who are disadvantaged by the classification."

The purposes behind welfare laws are to improve the well being of residents of the state, including non-citizens.

The citizenship restriction imposes, *inter alia*, a three year United States residence requirement for those married to citizens and a five year residence requirement for all other aliens, 8 U.S.C. 1427, 1430. This residence requirement is contrary to *Shapiro v. Thompson, supra*. We recognize that eligibility for citizenship involves in addition to residence, qualifications of literacy, attachment and good moral character.[2] However, the primary purpose of a citizenship requirements seems to be one of residence. Several states waive the citizenship requirement where there is a period of long residence. See: Appendix A.

The interests of citizens and non-citizens of Pennsylvania are intertwined, as is the case of appellee, Leger, who is married to a citizen. *Konvitz, supra*, at page 186, correctly observes:

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[2] Federal public welfare policies no longer rest upon the "worthy-person" concept. *King v. Smith*, 392 U.S. at 325 (1968).

> "Exclusion of the alien from participation in such benefits as relief, public works, public housing, old-age assistance, and aid to mothers (to mention only the more obvious forms of assistance) affects seriously not only the adult alien head of the family, but also his or her children. The exclusion affects the health and welfare of the members of the alien family; it affects their morals; it may lead to demoralization, crime, hospitalization. In the long run the public may pay the bill anyway; but when it pays it may be too late to get in return for the expenditure healthy, sane, normal Americans. An entire group cannot be kept in economic and social servitude without the community's suffering in terms of slums, delinquency, crime, disease, physical and moral degeneration; and when an alien is rejected by the armed forces because of illiteracy or physical disabilities, he is not the only one affected: the nation is affected."

Although states have latitude in dispensing public funds, *Dandridge v. Williams*, 397 U.S. 485 (1969), here the classification is not rationally supportable.[3]

Moreover, the treatment of aliens in whatever state they reside is a matter of national moment. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Their welfare and tranquility affect that of persons in all states. Accordingly, this discrimination cannot be considered as a purely state matter. Our immigration laws forbid the entry of those likely to become a public charge, 8 U.S.C. 1182(a)(15), and provide for the deportation of those who become public charges within five years after entry from causes arising prior to entry, 8 U.S.C. 1251(8). Appellees are not in these categories, their disabilities having arisen after entry.[4] Accord-

[3]Unlike *Flemming v. Nestor*, 363 U.S. 603 (1960), which excluded from social security benefits aliens deported for illegal entry, subversion or crimes, we are here concerned with resident aliens who remain a part of our population.

[4]Moreover, the mere receipt of Public Assistance does not render an alien a public charge under our immigration laws. Only where the

ingly, under the terms of their admission for permanent residence, they have the right to maintain their abode in any state in the union. In today's society, denial of social welfare is a substantial denial of the full scope of privileges conferred by admission as aliens. *Truax v. Raich*, 239 U.S. 33 (1915); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). The discrimination by Pennsylvania unlawfully discourages the free movement of aliens into that state contrary to privileges of admission conferred by the Federal Government.

CONCLUSION

The judgment below should be affirmed.

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governmental agency imposes an obligation to repay, requests repayment, and there is a failure to repay is the public charge provision of the immigration law invoked. *Matter of B-*, 3 I & N Dec. 323 (1948).

CITIZENSHIP AS AN ELIGIBILITY FACTOR IN FEDERAL-STATE PUBLIC ASSISTANCE PROGRAMS
Based on Characteristics of State Public Assistance Plans,
as reported June 1, 1970

"Must be a citizen of the United States . . ." except as specified: Unduplicated Total 8 States

Old-Age Assistance (8 States)	Aid to the Blind (6 States)	Aid to the Permanently and Totally Disabled (5 States)	Aid to Families with Dependent Children (1 State)
Arizona 1/	Arizona 1/	Arizona 1/	.....
Colorado	.....	.....	.....
Florida 2/	Florida 2/	Florida 2/	.....
Indiana	Indiana	.....	.....
New Hampshire 3/	.....	New Hampshire	.....
North Dakota 4/	North Dakota 4/	North Dakota 4/	.....
South Carolina	.....	.....	.....
Texas 5/	Texas	Texas	Texas 6/

1/- or resident of the United States for a total of 15 years
2/- or resident of United States for at least 20 years
3/- "(a woman who lost citizenship by marriage between March 2, 1907 and September 22, 1922 is construed to be a citizen); or an alien who has resided continuously in United States for 20 years.
4/- or has resided 10 years in the United States
5/- or has resided within the boundaries of the United States for 25 years
6/- applies to child; parent or caretaker relative need not be a citizen

Source of Information: DEPT. HEALTH, EDUCATION, WELFARE
Social and Rehabilitation Service
Assistance Payments Administration